ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
May 7, 2019 | Alexandria, VA

I. Attendance and Preliminary Matters.

Judge Donald W. Molloy, Chair
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGiverin (by telephone)
Catherine M. Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Cathie Struve, Reporter, Standing Committee (by telephone)
Professor Daniel R. Coquillette, Consultant, Standing Committee

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order and introduced two new members: Judge Jesse Furman, the new Liaison from the Standing Committee, and Judge Michael Garcia from the New York Court of Appeals (attending in person for the first time). Judge Molloy was pleased to report that when his own term expires this year, Judge Kethledge will be taking over as chair of the Criminal Rules Committee.

The Committee unanimously approved minutes of the October 2018 meeting subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. The Criminal Rules Committee had no action items at the last Standing Committee or Judicial Conference Meetings, and there are no rules out for public comment from this Committee presently. New Rule 16.1 was officially adopted by the Supreme Court and will become law if there is no contrary action by Congress.

II. Cooperators Report.

Judge Molloy asked Judge Kaplan to report on the activities of the Task Force on Protecting Cooperators. Judge Kaplan reminded the Committee that the Task Force delivered its report to Director Duff in two parts. The first was about potential procedural changes within the Bureau of Prisons (BOP), but the meeting to discuss implementation was cancelled because the BOP director resigned. The Department is going forward with the recommendations, and Judge St. Eve says they are moving things along. The second part involved changes to CM/ECF that would make less readily available information from which individuals could infer who was cooperating. There is a real tension between protecting the lives and well-being of cooperators on the one hand and on the other hand ensuring transparency and accountability. Director Duff referred this part of the report to CACM last spring. Unfortunately, it is not as simple to implement as the Task Force had hoped, and a great deal has to be done to CM/ECF system. There is no specific time line now, but it is moving forward.

Mr. Wroblewski said it had been a pleasure working with the Task Force. The Department received the recommendations, and he and Judge St. Eve speak regularly about them. With the Director and the Deputy Attorney General the Department reviewed all of the recommendations to see what we could do. Most are underway. For example, there has been a change in the internal regulations regarding discipline. The Department is now receiving data from the Sentencing Commission, which is creating the data base that was called for. The most difficult recommendation to implement is putting a secure room in every BOP facility where inmates can review documents that would be contraband if possessed individually. The logistical and challenges will require some time. The Judicial Conference Criminal Law Committee created a subcommittee to handle BOP issues, which meets every time the Criminal Law Committee is meeting. Their next meeting is June 5. Judge St. Eve, the Director of BOP, the General Counsel and others will be there. So it is moving ahead.

Professor Beale asked if Rule 49.2 (a rule that would address access to cooperation information through PACER) was still on hold, as CACM had previously requested. Judge Kaplan responded that it is still on hold.

III. Rule 43.

Judge Molloy asked Judge Hood to present the report of the Subcommittee on Rule 43. He noted that he had appointed the Subcommittee in response to a Seventh Circuit decision, and charged it to look into modifying the rules of presence at pleas and sentencing. He praised the reporters for their memo on the topic. After a lengthy phone conference, the Subcommittee concluded there was no need to change the rule. Judge Molloy noted that at a meeting of the Judicial Conference earlier this year, judges in larger districts in border states urged the Committee to change the rule, citing improved technology. There are judges, particularly in Texas, who do not want to travel to take pleas or sentence. Judge Molloy noted that the Subcommittee was consulted about whether there should be another conference call given this new input. The Subcommittee decided not to revisit its decision.

Judge Hood began by thanking the Subcommittee members and pointing out the discussion among Committee members about this topic in the minutes from the last meeting. She reported that the Subcommittee had reviewed the case law on whether the defendant and the judge had to be present at the plea and the sentence, and the Committee's own consideration of this issue in the past. The general consensus was that it was very important for both the defendant and the judge to be present at both the plea and the sentence, and that an amendment was not warranted. When Judge Molloy related the remarks that he had received from judges who praised the technology and said that video conferencing would really help in their districts, we polled the Subcommittee to ask if the members wanted to reconsider. They did not wish to do so. The Subcommittee recommends no change to the current rule.

Professor Beale summarized the reporters' memo, stating that the requirement in Rule 43 that the defendant be present is very clear at the plea stage, though a little less clear at the sentencing stage. Courts have read the sentencing provision narrowly in light of legislative history, so there may be a little better argument that video conferencing is currently allowed at the sentencing stage if the defendant has gone to trial or been present at the plea. But Rule 43 does require physical presence, and the Committee has discussed why physical presence is so important. If you've been in a courtroom, you know the physical presence of both the judge and defendant makes a huge difference. There were discussions at our earlier meeting about how the judge might be able to smell liquor, to see what the defendant's hands were doing, and so forth. Some of the defense lawyers emphasized that anything that separates the defendant from the court is a bad idea. The plea is the big waiver of all constitutional trial-related rights, and sentencing is the most human things that judges do. After discussing all of the policy arguments, the Subcommittee recommended no change in the rule.

The memo also discusses workarounds. Many members thought that *Bethea* (involving a defendant whose bones would break if he traveled) was a sympathetic case for which there should be a solution. The reporters' memo discusses some workarounds for these exceptional

situations. But the Subcommittee did not think the rules should be changed for a small number of cases because of concerns about the slippery slope and the need to maintain that line as a policy matter. Professor Beale noted that the feedback from the Texas judges who want to use video technology could be seen as an example of the slippery slope concern. If we made an exception from the requirement of physical presence for this one situation, there would be pressure to do it in more and more cases.

The reporters' memo described various ways to deal with the rare compelling case, including reducing the charge down to a misdemeanor, using a DPA, or a Rule 11(c)(1)(C) plea with a certain sentence and an appeal wavier. The memo also includes a discussion of whether the procedure in *Bethea* was indeed a fatal error, or plain error analysis would have allowed the case to be affirmed.

Professor King agreed and reiterated that there are two main reasons that the Subcommittee is recommending that no action be taken at this time. First, there will be constant pressure on defendants and parties from judges to expand any exception to the requirement of physical presence at plea or sentence. Second, there are many other ways to avoid reversing convictions and sentences as a result of agreed-upon solutions to this problem. So the Subcommittee decided that at this time changes would not be warranted.

Professor Beale noted that the Committee's own records reflect that pressure from judges. Judge Walter renewed his request to sentence remotely, and the judges in one Texas district want to use video conferencing to avoid frequent travel.

Although there will be very, very, seriously ill people in the system, there are other ways to deal with that problem. Judge Hood referred to the pages of the report referring to the workarounds. She observed that there may be some problems with particular solutions in certain cases (such as a defendant who does not wish his case to be transferred). Even so, the workarounds have been effective in some cases when a defendant is too ill to come to court.

Judge Campbell noted his high regard for Judge Lee Rosenthal, who was one of the judges who urged the Committee to reconsider this issue. She has a unique problem, because her district has thousands of § 1326 defendants (charged with illegal reentry) and hundreds of miles between courts. So either the judges must travel, or the marshals have to transport many people to the judges. (Judge Campbell noted his court has some of the same problems in Arizona, but not to the same extent.) The resolutions in those cases are quick and they produce relatively small sentences. So those cases probably present the strongest argument you could make for allowing video conferencing. Judge Campbell's view (and he suspected the view of the Standing Committee as well), is the same as this Committee: we just do not want to open that door. One of the hardest things district judges do is face the defendant and look him in the eye as we sentence him. We should have to do that. It brings a seriousness and a soberness to the process

that is good even though it is hard, and even though some judges have to travel to do it. So Judge Campbell did not see any issues with the Subcommittee's recommendation, and he foresaw no pushback from the Standing Committee. He said he really does think this is a door we want to keep closed because of the benefits of in-person pleas and sentences.

A member noted that the workarounds should be effective, supported the Subcommittee's recommendation, and expressed concern that any change just for border districts would raise equal protection issues.

Another member agreed with the decision not to amend the rule, but raised a mild cautionary note on the workaround of an appellate waiver in the plea agreement. In Chicago, there is an exception for the sentence and the validity of the plea agreement that is not waived. There is some authority that even in cases where the appeal of the sentence is waived, a defendant is not allowed to waive the validity of the plea agreement. So it is conceivable that in some jurisdictions this particular workaround would not be foolproof. That said, he agreed with the comments not to amend the rule. Judge Molloy also noted the Supreme Court's recent opinion in *Garza*, finding it was a violation of the Sixth Amendment right to effective assistance for counsel not to file an appeal even though there was an appeal waiver.

Judge Molloy asked if anyone on the Committee disagreed with the Subcommittee's recommendation. Receiving no response, he stated that the record will show the matter has been seriously considered and the Committee has elected not to alter the rule. He noted he would get in touch with the judges and let them know of the Committee's decision.

III. Rule 40.

Judge Molloy turned to the suggestion to amend Rule 40, and he asked Judge McGiverin to brief the Committee on the issue.

Judge McGiverin apologized for participating by phone due to his father's health. He noted the reporters' memo provides all the background. Generally, this issue arises when a defendant on pretrial release is supervised in a different district (District B) than the prosecuting district (District A), and is brought before the magistrate judge in District B because the defendant has allegedly violated the conditions of release. There is general consensus among the magistrates consulted and the reporters that the rule is not clear in at least two regards.

First, Rule 40(d) says to apply the procedures in Rule 5 "as applicable." This raises the issue of what parts of Rule 5(c)(3) actually apply. The issue can be resolved by careful analysis, but there are some differences of opinion arising from the lack of clarity.

The other area of possible confusion concerns Rule 40(c), which seems to allow the magistrate judge in the arresting district to alter the release order that was issued by the

magistrate judge in the prosecuting district. There is a possible conflict between that and 18 U.S.C. § 3148(b), which appears to require the defendant to be brought back to the prosecuting district and would also severely limit whatever could be done by the magistrate judge in the arresting district. So the question is what (if anything) does Rule 40(c) apply to, and what does it allow the magistrate judge in the arresting district to do. Does it allow for an order of temporary detention? For release pending final revocation hearing in the prosecuting district?

The final point is that this situation rarely arises. But it does from time to time, and practically every magistrate judge that Judge McGiverin consulted thought the rule is unclear and probably could be clarified pretty easily.

Professor Beale noted the report speaks for itself on the specific issue that Judge Barksdale raised. And as explained in footnote 1, it is not entirely clear what the statute requires. Neither the rule or statute is a model of clarity. So what should be done where? Would it be desirable for the judge in District B to have more authority to do more things? Some judges have read it as allowing for some greater authority. Judge Miller, who served on the Committee that restyled Rule 40, thought that it allowed for a different balance of authority. And in addition to the question how much should be done in District B, the arresting district, there is the issue of whether these technical questions could be answered more clearly in the rule. So there are both technical questions and policy questions which presumably we would consider if we took up Rule 40. The Committee would need to come to its own determination about whether the statute would allow more to be done in District B.

Professor Beale acknowledged that Judge McGiverin was incredibly helpful, and that his advice reflected not only his individual experience, but also input from the many court personnel and other magistrate judges he consulted. There was agreement that this is not a big problem, and it is not urgent. However, people did say the rule was not clear, so each judge has to figure out how to interpret the "as applicable" language. Because these questions arise infrequently, judges end up reinventing the wheel. So even though it is not a big problem, it would be nice to fix.

Judge McGiverin agreed. The situation doesn't arise very often, and Rule 40 really doesn't help that much. In his cases, he provides more process to defendants than the rule requires. There is a difference of opinion as to what the magistrate judge in District B is allowed to do, and he thought it possible that they are allowed to do more than his reading of the statute. Some magistrate judges believe they have the authority to temporarily release the defendant pending the revocation hearing in the prosecution district, for example. Rule 40 could be revised to parallel Rule 32.1, which specifies the procedures for revoking or modifying supervised release rather than providing a cross reference to other rules, so that the magistrate judge could look at one Rule and know what to do.

Judge Molloy asked for views on whether the Committee should take up these issues.

One member said this situation doesn't come up that much, so we do not need to do anything. But the fix might be simple if we chose to do something.

Another member agreed it doesn't come up that much, though the frequency depends on whether there are multiple districts and on the distances between courts. This member often deals with defendants who were prosecuted in a neighboring district that is right next door. If the probation officer asks for an arrest warrant, it will not be months before the defendant goes back to the prosecuting district. He will be there the next day. The member thought the rule and statute are sufficiently clear that when it does come up, it seems straightforward. It is theoretically possible, if an absconder violates, to have a detention hearing in one district where the magistrate orders the person released. If that happened, the AUSA would seek a stay, probably get it, and the next morning that person would be brought to the prosecuting district to have a hearing about compliance. So at the end of the day we don't need to change the rule.

Another member agreed the situation is not common, but thought it was more complicated. One of the questions is what the reference to the detention order is. The member looked up § 3142 referring to detention for appearance, but there is nothing prohibiting the judge in District B to alter or amend. So it is more complicated, but it doesn't come up much.

Several additional members agreed that this is not enough of a problem to address at this time. One suggested that perhaps the conditions of the release order allowing defendants to be supervised in a different district could set forth what happens if they are picked up for a violation. That is perhaps something the courts could do. In practical terms, what happens now is that the defendant appears before a magistrate judge, and then they ship him back where the proceedings occur.

One member expressed a different view, emphasizing that the Committee is being asked to clarify the rule, not change process or policy. This would be an easy fix. When there is a relatively easy fix, and there is a rule with significant ambiguities, the member thought it might be responsible for the Committee to address those.

Professor Coquillette remarked that he agreed with the majority. Fiddling with rules puts a burden on the bar to keep track of what we are doing. Unless there is a real reason to do something, he favored a conservative approach.

Judge Campbell added that every Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules.

Judge Molloy decided there was no need to send this to a subcommittee, and Judge Kethledge agreed.

IV. Rule 16.

Judge Kethledge, Chair of the Subcommittee on Rule 16, reported on the mini-conference on the discovery of expert reports and testimony that had been held the day before the Committee's meeting. The Committee had received proposals to amend Rule 16 so that it more closely follows Civil Rule 26 in the disclosures for expert witnesses. The Department of Justice has been adamantly opposed to that suggestion. The Committee had asked the Department at the last meeting to give us a proposal that they could live with. They've had some intervening events that made it hard for them to do that, including the government shutdown and the changeover of the deputy attorney general, so they did not have a proposal at the mini-conference. We had a very strong group present, including six or seven defense practitioners and five or six people from the DOJ. The defense practitioners and most of the Department of Justice people had significant personal experience with these issues and had worked with experts. We broke the discussion down into two parts: (1) what concerns or problems do you see with the current rule, and (2) what suggestions do you have to improve the rule. It was a very candid and vigorous exchange. It was a very impressive group that came and gave us their thoughts.

The defense participants identified two principal problems with the rule. First, Rule 16 has no timing requirement. It says only that a summary must be provided. Some practitioners described receiving summaries a week or even the night before trial if the government decided at the last minute to use a witness. This obviously impairs the ability of the defense to prepare for trial. Second, the government disclosures don't include sufficient detail. One example was a statement that the expert had examined the cell phone, had extracted data, and would opine that the data show the defendant is guilty. The defense participants felt the summaries they were receiving were too conclusory and vague to allow them to prepare to cross examine the witness. The Department of Justice representatives, in contrast, said they have not heard of any problems with the rule, though they talk regularly with defenders. They said these issues are not litigated, and there are not relevant appellate decisions. (As an aside, Judge Kethledge noted that as a court of appeals judge he did not find the absence of appellate decisions indicative of anything relevant here.) The Department's representatives did not sense any problem.

Judge Kethledge noted his impression that there are significant variations among districts. Andrew Goldsmith has done a salutary job of training in the 93 districts and made good progress, but still there is a lot of variation on when an individual AUSA is providing a summary and what that summary says. And people procrastinate. Other things with deadlines are addressed first, and things with no deadline tend to be pushed farther back and produced closer to the time of trial. Notwithstanding good practices in some places, there was variation. He also noted Judge

Campbell had made a helpful comment informally, which was that we have to write rules for the weaker performers. The stronger ones seem to have pretty good practices. But the weaker ones are doing this really conclusory name, rank, and serial number type of summary. There is a sense that we need to reform the rule to bring that performance up to the level to allow defense counsel to prepare adequately for trial

When the discussion turned to suggestions about how to address the problems, we made significant progress. Everyone had different perspectives or concerns, but everyone was working toward the best practice for the interests of justice. We got to the point where there was a willingness and open mindedness to acknowledge fair points on both sides. Judge Kethledge outlined his sense of the common ground. On timing, there are two paths. First, there was interest in saying that the summaries need to be produced within 45 days of trial. That date could be adjusted for good cause by the district court, but the default would be 45 days out to provide the summary. Alternatively, we also talked about a different formulation – "sufficiently ahead of trial to allow defense counsel to adequately prepare"– borrowed from a pending amendment to Rule 404(b). That is more flexible, and there was a sense that it would eliminate many for good cause shown motions that would routinely be filed by the government. There seemed to be some approval of that from both sides.

As to the content of the summaries, Judge Kethledge thought Mr. Goldsmith had said he would be ok with adopting a statement from Rule 26 that the summary must be a "complete statement" of the expert's opinion. Part of the defense complaint was that the experts testify beyond the scope of the summary. For example, one defense attorney described a case where the defense was told a witness would be testifying about the way things happen in the drug trade. But at trial, the witness started talking about the usage of drugs and what drug users do. The topic of usage had not been not disclosed before trial, so the witness was going beyond the scope of what had been disclosed. A complete statement requirement could address that problem. The government could potentially supplement later. Expert testimony is sometimes under development or fluid up until the time of trial. But the statement ought to be complete at least as to the time of production, and if an expert's opinion changes you have to produce the changes sufficiently in advance of trial so the defense counsel can prepare. Some things are not controversial at all: providing the qualifications of the expert and a list of the expert's prior testimony for the previous four years (both of which are in Civil Rule 26). Recalling his days in practice, Judge Kethledge said that when he cross examined experts he found that to be enormously useful. It is a very powerful tool for truth. Some experts will say anything anytime, and if you can reveal that in a cheerful way in front of a jury it gives them a very useful perspective on that expert.

Judge Kethledge said the mini-conference had produced something that the Subcommittee could incorporate into proposed language. His goal is bring a proposed amendment for Rule 16 for expert disclosures to the full Committee for a vote in September.

Mr. Wroblewski said he thought the mini-conference was helpful, and a credit to everyone involved. It was a very civil discussion that shed a lot of light on the issues. The big success for him is that it helped define the problem. The Department came to the mini-conference saying there was no problem because the problem had not been clearly defined. The mini-conference revealed that defense lawyers agree this is not a problem about forensics or expert overstatement. If you broaden discovery you are not going to address overstatement. It is not about knowing the qualifications of the expert. It is not about prior testimony, although you may want to have a list anyway. It also revealed tremendous confusion about the line between lay and expert opinion testimony, but that is not about discovery. The problem defined as he heard it was timing and sufficiency of the notice. It was a major success to come to agreement about a definition of the problem.

The discussion also revealed that, given the practicalities of criminal practice across the wide range of cases that are in federal criminal justice system, the solution cannot be one size fits all. It is tempting to want to put a number of days before trial. But there are cases that live within the 70-day Speedy Trial Act (though not most of them), and our rules must be adapted to fit those cases. If we had a rule requiring notice 45 days before trial, experts would have to be identified immediately for most cases that would eventually end up in guilty pleas, resulting in unnecessary costs. At the same time he agreed with Judge Kethledge that improvements can be made, and the Department will support those improvements. Judge Kaplan's and Professor Capra's suggestion about timing was something he thought the Department will be able to support. Getting rules regarding sufficiency will be hard. When you look at the Civil Rule 26 and the language about opinions and bases, will "complete" opinion make a big difference? He was not sure, and he anticipated that if it were circulated among U.S. Attorneys around the country that there would be significant concern about knowing what that means. It would be very helpful to emphasize that those opinions can be supplemented beyond the initial disclosure.

Mr. Wroblewski anticipated that the Department would have training this year with Andrew Goldsmith and Donna Elm, and it will be required training for every one of the 6000 prosecutors around the country. He said Mr. Goldsmith is committed to doing that. Since 2010 every Justice Department prosecutor has been required to go through 2-4 hours of discovery training every year. Mr. Goldsmith does most of that, and he is committed to working with Ms. Elm to make sure this issue is addressed.

Finally, Mr. Wroblewski noted the very interesting discussion about reciprocity, and that the rule can and should include reciprocity. He noted one of the really candid things that came out at the mini-conference was that a rule change on this point will not matter. Despite the rules that currently require pretrial disclosure to the government of a scientific report that is going to be used by the defense in their case and chief, the defense bar believes that they don't have to disclose that until minutes before the person takes the stand. That is the Department's experience about reciprocity. It is in the rule currently, and as we make changes, it should be left

in. But the candid view of the defense attorneys was it doesn't matter. They are not going to turn over anything any earlier than they absolutely have to.

Judge Molloy credited Judge Campbell with suggesting the mini-conference approach, which has really helped identify the real problems and narrow the scope of what the Rules Committees are being asked to do. There were two proposals provided to the participants, and the one submitted by a former member of this committee might be grounds for starting. DOJ is going to make some effort, given the change in administration, to try and get on board with something acceptable to them. The plan to get it on the agenda for September is good.

Professor Beale added that some of the defense participants explained the special difficulties faced by CJA lawyers who learn belatedly that an expert will be presented, or that an expert's testimony will go into another area. It takes 30 days for a CJA lawyer to get approval to hire an expert. Then they have to find and hire the expert. If it is a short timeline it will be more expensive to hire the expert, and if you are someplace like West Virginia where the experts may not be available locally, that is an even greater problem. So having people from different practice areas was extremely helpful, and going forward we will be able to draw on those folks and others. She also thanked everyone who helped us identify these experts. We absolutely needed them in the room.

Judge Campbell said that as he listened to these stories of last-minute disclosures or very vague disclosures, he was asking himself where are the judges in these cases? But what the defense attorneys then said made sense. If they try to go to the judge for help, there is nothing they can point to in the rule to say this is late, or that they don't have time to respond. So it would be helpful to have something in the rule, even if we don't have a hard date, to have something like the 404(b) language that says it has to be sufficiently ahead of trial to give the defense a fair opportunity to meet the evidence. Then the defense has something in the rule they can go to the judge with. They can say there is no way I have a fair opportunity to meet the evidence because I just got this last week and trial starts next week. It was also pointed out that Rule 16 has some pretty good remedy provisions. But again, if there is nothing in the rule to show a violation you can point to, it is hard for a judge to use those remedies. If there is some requirement for a fair opportunity that has clearly been denied, then the judge can look to Rule 16 and ask should I grant a continuance? Or should I deny the expert? When the potential for such remedies becomes real, then everybody has a better incentive to comply with the rule and maybe some of the weaker players will do better. The training the DOJ is doing is terrific. But we have learned over the years with the rules process that the trickle-down effect takes a while to get to the lawyers that are not going to be attentive to their duties, and if there are real consequences in the rule for that behavior it will help.

A member said he wanted to share the sense of relative optimism from the mini-conference. There seemed to be a lot of consensus as to fact patterns that were bad. Judge

Kethledge had a great comment: it seemed like we were really grappling with what's the best legal rule to respond to this, rather than disagreeing about what was a good situation and what was a bad situation. So this seems to be an issue on which we can make a lot of progress, and he was optimistic that we will.

Another member said he thought this was a tremendously important thing to do. The variety of experts testifying in criminal cases in the last few years is mind boggling: experts on Al-Qaeda; trace DNA when there is more than one contributor to sample; cell site location technology; spoliation of electronically stored information; the genesis through metadata of testimony about authorship of documents; and the economics of college basketball. It is really important to have the material well in advance of trial both to prepare to cross examine and to get their own expert and prepare. Without something in the rule, the defense is really in a pickle. This member's preference is to pick a number of days, and to say unless otherwise ordered. That will give the judge plenty of discretion to alter that obligation, but gives incentive to go to the judge early and get control of the issue. Also, the word "complete" is very important. Civil practitioners know what the report is supposed to look like. If you leave "complete" out you are asking people to do something nobody would dream of doing on the civil side. He also disagreed, based on his experience, with the assertion that nobody on the defense side pays any attention to the reciprocity obligation.

Professor King drew attention to an interesting suggestion by defense participants that if there is going to be reciprocity it should be limited to responsive experts, i.e., experts on topics the government said its experts would address. Reciprocity, they suggested, should not extend to experts on other topics that the defense is keeping in their back pocket depending upon how the trial goes. There was a difference of opinion in the room about whether those experts should be or are disclosed. Also, in many districts, judicial orders did require disclosure of defense experts a certain number of days after the disclosure of government experts.

A member agreed that was an important point. He explained that about 20 years ago in the UK, there was a proposed change that the prosecution had to disclose to the defense anything that could be helpful to the defense and undermine the government's cases. The defense had the option of producing a statement of defense, laying out the defense case, what part is disputed and why. The carrot was the disclosure. Knowing the defense case, the government knew better how to disclose. When it was proposed the defense bar fought it, seeing it as the end of fairness and the right to remain silent. A defense barrister friend told the member that after 16 years he had learned these concerns were completely wrong, and the change had been a great boon to defense practice. By laying it out for the government, they got much better disclosures from the government.

Another member added that there was a real disagreement on whether the rule should require a signed report unless the court orders or parties agree otherwise. He saw the issues as

timing, adequacy, reciprocity, and whether the report should have to be signed. He invited those with thoughts on this to share those thoughts with members of the Subcommittee.

A member noted the mini-conference was helpful and added that Rule 16(c) already allows supplementation/continuing duty to disclose. He had been surprised to hear some of the scenarios laid out by the defense attorneys with vague and inadequate disclosures. The member thought those disclosures would have violated (a)(1)(G) as now written. Perhaps adding the word the "complete" would emphasize that requirement and reduce the frequency of violations of the current rule.

With regard to signing reports, Judge Kethledge noted that he thought the government had agreed that at least in some cases the AUSA could draft the complete statement and have the expert review, approve, and sign it. The DOJ argued that the experts have their own language and standards and code of how they do things, and that no AUSA can do that. But the experts are going to be testifying, and if it is a complete statement, it should be couched in the same terms they are actually going to testify. If you have to do it anyway, why can't the person review and sign. Judge Kethledge recalled that Mr. Goldsmith had said that might make sense. That might be a way to make these less expensive for the government.

Mr. Wroblewski responded that forensics has become a very highly regulated industry, and rightly so because of genuine concern about methodologies. The problem lies in the words used, so the industry is moving to "uniform language." This is reviewed by the analyst and supervisors in the lab and follows certain language and protocols. If that is what is needed, then the report with the precise language has to be turned over already. The concern is that we have to go back and work through the regulatory rules within the lab. They may or may not sign it. This would be a different summary and would have to work through the regulatory process. They would not want to sign a new document.

Professor King added that she heard defense participants explain that they considered the report and the disclosure to be two different things. The report relates "this is what we did." What they need is "what we will say." They are different documents. They cover different things.

Mr. Wroblewski stated that for forensics those reports are all turned over. He was not sure that is true with other experts, such as an expert on Al-Qaeda. The experts are basing their expertise on years of study, knowledge, and books. He was not sure what gets turned over beyond the two paragraph statement: here is the opinion I'm going to give, and here are my qualifications and experience.

Judge Kethledge noted that the signature doesn't have a disclosure function, it is more for impeachment at trial. So it is not important for preparation at trial.

V. Case update relating to amendments previously considered by the Committee.

Judge Molloy asked the reporters to present updates on recent interpretations of Rules 6 and 12.

A. Rule 6. Professor Beale reviewed the Committee's past consideration of a suggestion to amend Rule 6 to address disclosure of historically significant grand jury materials. The suggestion, from Attorney General Holder, proposed that Rule 6(e) be amended to provide a procedure for a district court to order the disclosure of archival grand jury records, upon motion with notice and hearing. The proposed rule defined "archival" records as having exceptional historic importance and involving files that had been closed at least thirty years. It allowed disclosure if the court found no living person would be materially prejudiced by disclosure or prejudice could be prevented by redactions or other reasonable steps, the disclosure would not impede any other investigation, and no other reason existed why the public interest requires continued secrecy. The proposal was prompted by cases in which district courts, in response to requests from historians and others, had granted access to historically significant grand jury records decades after the investigation. For example, requests were made in the Alger Hiss case and the Nixon case. In this Committee, a subcommittee chaired by Judge Keenan recommended that no amendment be made, based on its determination that the courts were doing fine with this issue without a specific provision in the rule. There were very few such cases, and there was authority in some circuits that allowed courts to exercise their discretion to release historical information in exceptional circumstances. The Committee agreed with the subcommittee, and reported its decision not to proceed to the Standing Committee where it ended.

Professor Beale explained that although there is no pending proposal to revisit this, the Committee might be interested in knowing that the situation has changed somewhat. There is now a circuit split on this issue, with two decisions in the past few months, each with dissents. The Eleventh Circuit upheld disclosure of the grand jury records of an investigation of a mass lynching from 1946, citing circuit precedent allowing the court inherent authority. The court's opinion included copies of this Committee's materials as support for the presence of narrowly circumscribed inherent authority outside of Rule 6. In April, the DC Circuit disagreed in a case about a 1957 investigation of the disappearance of a critic of a Puerto Rican official, and ruled there is no such inherent authority, and courts cannot contravene the rule. It affirmed the denial of disclosure. A judge who is now on the Standing Committee dissented. Professor Beale noted this was an update, and not a proposal to consider an amendment. It had been a stable area, but it is no longer.

A member commented that the inherent authority issue appears to be an issue of the substantive federal authority of the courts, rather than a procedural issue that we could clear up if the courts disagree. Professor Beale noted that one argument that has come up in these cases is

whether the rule was intended to occupy the field. The member responded that if it is actually part of the inherent federal judicial power, then the Committee has no authority to limit it.

Judge Campbell commented that when the Civil Rules Committee amended Rule 37(e), concerning spoliation, it intended to eliminate side litigation and included a comment stating the intent of the rule was to occupy the field and eliminate inherent authority. But the first judge to construe the rule held that the rule could not do that, and the court still had inherent authority. So even if we try, we might not be successful.

B. Standard for reviewing untimely claims under Rule 12. Professor King reviewed the Committee's consideration of amendments to Rule 12, eventually ending up in a 2014 amendment to that rule. She noted the amendment made several improvements, but wanted to draw the Committee's attention to one circuit split the amendment had not resolved. Before the amendment, courts disagreed upon the standard of review that applied when a party raised for the first time on appeal an issue that should have been raised before trial under Rule 12. Some courts had held that appellate courts should apply good cause, others held they should apply plain error under Rule 52, others applied both, or either. This difference of opinion persisted after the rule change. She reviewed recent cases in which a court of appeals panel had pointed to the text of the amendment, the committee note, and the minutes of this Committee, claiming the Committee took their respective view.

The current cases serve as a reminder that the documents we create are sometimes used by courts as evidence of meaning, particularly when there is ongoing disagreement. The most recent decisions on Rule 6 and Rule 12 rely on different parts of this Committee's records. A member asked if there was a proposal to amend Rule 12 before the Committee. The reporters clarified there was no proposal, that these decisions regarding Rule 6 and Rule 12 are examples of how the courts are using the work of this Committee.

In response to a member's question how the minutes are created and if there is a recording, the reporters explained that they prepare the minutes of each meeting working from an audio recording. After approval by this Committee, those minutes are posted on the uscourts.gov website. This is part of the legislative history of the Committee's work, so it is very important to correct the minutes if you believe they are not accurate.

Ms. Womeldorf noted that the recordings are for the convenience of the reporters. They are not maintained as part of the historical record. The quality also varies. Sometimes you can make out what is said, and sometimes you can't. The historical record includes everything that ends up in the agenda books, the minutes after they are approved, and anything circulated to a quorum of the membership.

Professor Beale explained that subcommittee memos and the rule drafts the subcommittees consider are not normally part of the formal record. Those are not circulated to a

quorum on the Committee and are not public. But if they are added to the agenda book for the full committee as helpful explanation – which they often are – they become part of the formal record.

Professor Coquillette added that even the committee notes, which we all agree are very important, are not approved by Congress. The text of the rule itself is the ultimate authoritative statement. That is one of the reasons why it is so important that nothing in the notes detract or add to the text of the rule.

Ms. Womeldorf noted that while the committee notes do go to the Supreme Court, the orders of the Court adopting the rules do not include the notes. The Court pays close attention to the notes, and there have been instances where there have been questions back about committee notes. But they are not part of what the Court orders.

After reminding the Committee that the next meeting is in Philadelphia on September 24, 2019, Judge Molloy adjourned the meeting.